

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

IN RE:)	Case No. 92-50714
)	Chapter. 12
ROBERT KENT ANDREWS,)	
)	
Debtor.)	
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ROBERT KENT ANDREWS and)	Adversary Proceeding
JONES KENT ANDREWS,)	NO. 94-5320
)	
Plaintiffs,)	
)	
vs.)	
)	
TIMOTHY EDDIE McCOURY,)	
)	
Defendant.)	
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FINDINGS OF FACT and
CONCLUSIONS OF LAW

This case was tried before the undersigned United States Bankruptcy Judge on June 5, 1996. At that time the parties requested the record be kept open to permit a telephonic deposition of an additional witness. This being done, and the witness' testimony admitted by stipulation, the record was completed with some additional testimony on February 5, 1997. This proceeding arises in the Bankruptcy case of Plaintiff Robert Kent Andrews ("Bob Andrews") who filed Chapter 11 on October 23, 1992. His case was converted to Chapter 12 on April 8, 1993. On April 22, 1993, Plaintiff Jones Kent Andrews ("Jones Andrews") joined the Chapter 12 voluntary proceeding as an additional debtor. This adversary proceeding was filed on October 14, 1994 by the current plaintiffs and an additional plaintiff, Patricia T. Andrews.

[Patricia T. Andrews was allowed to withdraw from this action prior to trial]. The Plaintiffs' action seeks to recover monies claimed to be owed to the Debtors on an open account by the Defendant Timothy E. McCoury.

FINDINGS OF FACT

Many of the facts of this matter are not in dispute, at least as between the parties to this action. Both the Plaintiffs and the Defendant are tree farmers who grow and market Christmas trees and other nursery stock. Each is a business acquaintance of Desmond Moore ("Moore"), a Florida tree salesman who operates a Christmas tree lot in the metro Washington, D.C. area.

During the 1980's, Moore introduced the Andrews to McCoury for the purpose of selling him trees. The parties agreed to a three-way swap arrangement whereby the Andrews would provide McCoury with white pine trees from their farms. McCoury would pay for these trees by shipping an equal value of Christmas trees from his farm to Moore at his Christmas tree lots. Moore would then pay the Andrews for the trees they had provided McCoury from the proceeds of the trees that McCoury provided to him. Because Mr. Moore had arranged the sale to McCoury, Andrews would pay Mr. Moore a small commission on the trees McCoury received. This arrangement lasted for at least five years.

In December, 1991, and as represented by six separate invoices, McCoury received a total of 3,791 white pine trees from the Andrews. McCoury sold the White pines to his customer Kroeger

Stores and was paid for them at the price of \$8.00 per tree for a total of \$31,768.00.

The parties disagree as to the terms of the 1991 sales. Bob Andrews says that early in 1991 Moore told both he and McCoury that Moore would no longer participate in the three party swap, and he would not be responsible to pay for any such trees.

McCoury's testimony is exactly the opposite. He says neither Moore nor Andrews discussed changing the terms of their arrangements with him prior to January, 1992. He contends that the 1991 sales were conducted under their customary three-party swap arrangement and that he paid for the white pine trees by shipping other Christmas trees to Moore's lots. To demonstrate this, McCoury introduced six invoices for trees shipped to Moore during December, 1991, and totaling \$31,317.00. This total is only \$451.00 less than the total dollar value of the trees McCoury received from Andrews. McCoury says when Moore and he settled up on the account, and Moore agreed to waive the \$451.00 difference.

The parties' testimony also differs as to what happened after these transactions. Bob Andrews testified that after McCoury picked up the white pines, they had several conversations in January-February, 1992 in which McCoury promised to pay Andrews as soon as he received payment from Kroeger. However, payment was not forthcoming, and after February, Andrews says that McCoury would not answer his phone.

McCoury denies this as well. He says that over the years he never contracted directly with Andrews for trees, but rather

ordered them from Moore who arranged for the sales through Andrews. McCoury testified that he was unaware that there was a problem until January or February, 1992. Then Andrews advised that he wanted to change the deal so that McCoury would pay them directly rather than swapping through Moore. This was because Andrews could not collect from Moore. McCoury says that he had already sent Moore his December shipments of trees, and having paid for the white pines, he refused.

It is undisputed that thereafter Plaintiffs hired a bill collector to seek recovery on these accounts and ultimately filed the present suit.

The action presents a classic case of a "swearing contest." Both parties, armed with their own testimony and invoices, contend that they are in the right and the other party is not telling the truth. Seeking to break this evidentiary impasse, the parties asked the Court to keep the record open so that they could depose Moore. Moore was deposed prior to the February, 1997 continued trial date.

Both sides were disappointed, however, because Moore's testimony did not support either. In several respects, Moore's testimony contradicted material facts on which both the Andrews and McCoury agreed. For example, Moore who is both elderly and in poor health, denied that there had ever been a swapping arrangement between the three parties. He denied that he brokered the Debtors' trees, and contended that he had always paid cash for whatever trees he bought from McCoury.

Perhaps, Moore, due to his infirmities, simply did not remember. He may have been seeking to avoid taking sides in a dispute between former business associates or was afraid he would be called upon to pay the debt. He may have been concerned about creating problems for himself with the Social Security Administration or Internal Revenue Service for failing to report earned income. Whatever the case, Moore's testimony was not credible and was so confused that it did not help to tip the scale in favor of either party.

CONCLUSIONS OF LAW

There is no dispute that the Andrews were owed a debt of \$31,768.00 by McCoury for 3,791 white pine trees he obtained from them in 1991. Plaintiffs have met their prima facie burden and the burden rests with McCoury to establish by the greater weight of the evidence that he in fact paid that debt.

Two evidentiary issues must be decided. First, was the sale of white pine trees a two party sale for cash, or was it instead a three party swap arrangement? Second, if the latter, has McCoury demonstrated that he paid under that arrangement by providing trees to Moore?

As to the nature of the transaction, the parties' past course of dealing was to use the three party swap. Under an ongoing sales contract between two businesses, the terms of such agreement apply to future transactions unless one party gives reasonable notice to the other that it is terminating the agreement. N.C.G.S. 25-2-

309(2). Such notice must be received by the other party to make the termination effective. N.C.G.S. 25-2-309(3).

In this case, before 1991, the parties had always done business by the three party tree "swap." This course of dealing would control the terms of their 1991 sales, absent strong evidence that one of the three had notified the others that he was withdrawing. Proving a termination of the agreement is the Plaintiff's burden.

In this case, the only evidence to this effect is Bob Andrew's statement that Moore had told McCoury and him that he, Moore, was out of the deal. This statement is not corroborated. No documents show this alleged withdrawal. And no specific facts were testified to as to the circumstances under which Moore was to have communicated this information to McCoury and Andrews. For his part, McCoury flatly denies that Moore ever told him this. The only neutral party to the deal, Moore, not only disclaims knowledge of the 1991 deal, but denies that there was ever a swap arrangement at all.

Although there is not a great deal of objective evidence about this issue, what there is suggests that the parties meant to continue the "swap" in 1991. For example, Bob Andrews prepared written invoices for each of the loads of trees sold to McCoury. In four of those five invoices, under the "Terms" block, Andrews has written the words "Des Moore." This language strongly suggests that the parties thought they were continuing the "swap" arrangement that they had always employed before.

From McCoury's testimony, the historical course of dealing between these parties, and the terms of the invoices, the undersigned believes the greater weight of the evidence supports McCoury's account. In 1991, the parties intended to "swap" their trees through Moore.

As to the secondary issue, payment, and although here again the evidence is contradictory, the Court believes it more likely than not that McCoury substantially paid Moore in discharge of his debt. Such payment to Moore is reflected in McCoury's six (6) invoices, about which McCoury testified at length.

As to each invoice, McCoury's testimony was clear and specific as to the facts and circumstances about the delivery. His recall of those circumstances makes it unlikely that his testimony was fabricated. Really, the only direct, contradictory evidence about these shipments was Moore's general statement that he had paid McCoury for everything he bought from him. Moore's recollection of these events was, even in the most generous light, very poor. In fact, apart from this statement, Moore had little or no recollection of any of these sales. As such and for the reasons noted above, the Court did not find his testimony persuasive.

In the end, and although this is not the strongest evidentiary record, the evidence supports the conclusion that the parties continued in 1991 to "swap" trees through Moore, and that the Defendant McCoury paid for those trees by his shipments to Moore in the total dollar amount of \$31,317.00. This would leave the sum of \$451.00 owing to the Andrews by McCoury. While Desmond Moore,

according to McCoury, agreed to waive these monies, the Court finds no evidence that he was in a position to do so. As such, the Court believes the \$451.00 difference remains owing to the Andrews by McCoury and will enter judgment in favor of the Andrews in this amount.

This the 26th day of Feb., 1997.


United States Bankruptcy Judge

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The complaint of Plaintiffs **ROBERT KENT ANDREWS and JONES KENT ANDREWS** against Defendant **TIMOTHY EDDIE McCOURY** having come on for trial before the court, and based upon the containing findings of fact and conclusions of law, entered contemporaneously herewith and for the reasons stated therein, JUDGMENT should be granted in favor of the Plaintiffs and against Defendant in the amount of \$451.00 plus costs and interest at the legal rate.

This the 26th day of Feb., 1997.


United States Bankruptcy Judge